Federal Court  Cour fédérale

Date: 20221128

Docket: IMM-4411-21

Citation: 2022 FC 1636

Ottawa, Ontario, November 28, 2022

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

DICKENS OCHIENG OPEE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review of a decision [Decision] by the Refugee Protection Division [RPD] dated November 12, 2020, which dismissed the Applicant's refugee claim because it had no credible basis.

II. Facts and background

[2] The Applicant is a 47-year-old Kenyan national who arrived in Canada on a travel visa in October 2019. The Applicant submitted a claim for refugee protection. The Applicant claimed to work in Kenya for the Kajiado Country finance department, where he claims to have acted as a whistleblower attempting to expose corruption. As a result, the Applicant alleges he is in danger from the directors of Tata Chemicals Magadi Ltd., officials of the Kajiado County and the Kenyan police.

[3] On November 12, 2020, the RPD refused the Applicant's claim for protection, finding the Applicant was neither a *Convention* refugee nor a person in need of protection and there was no credible basis for his claim, pursuant to section 107(2) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [*IRPA*].

[4] The RPD did not believe the Applicant's claim he was a whistleblower who tried to expose corruption in Kenya. Specifically, the RPD weighed and assessed the evidence and found:

> a. The applicant claimed to be working at the Kajiado county office's finance department in Kenya. The applicant repeatedly confirmed that his office never pursued legal action against Tata Chemicals because the directors of Tata Chemicals had bribed Kajiado country officials. He also confirmed that he would have known about any such legal action, given his role working for the county; Indeed he told the RPD during the hearing that "To be certain it was [not] pursued through the court."
>
> b. The RPD put a newspaper article to the applicant, which the RPD obtained from the internet, indicating that a Kajiado Court had quashed a tax bill and ordered renegotiations between Tata Chemicals and Kajiado County. The applicant replied that the

newspaper article was probably not genuine. When the RPD pointed out that the article was from the same newspaper from which the applicant had himself submitted another newspaper article, the applicant "…did not say anything to this observation by the panel and remained silent."

c. The RPD then again asked the applicant if there was a Court case involving Tata Chemicals and Kajiado County. The Applicant again said that there was no court case;

d. The RPD then put to the applicant a judgment from a court case involving Tata Chemicals and Kajiado County, which was available on the internet, and quoted to the applicant the case law citation. Following this, the applicant "…admitted that there was a court case between the parties involved." When the RPD asked the applicant why he withheld this information, the applicant "…did not answer the question and was silent."

e. When asked if he disputed the information in the court transcript, the applicant said that he accepts that the court transcript is genuine, and he "…confirmed that there was a court case between Tata Chemicals and Kajiado County and that he knew about it."

f. That a purported photocopy of a newspaper article, filed by the Applicant to support his allegations, from the "County Press" dated October 2019, outlining the applicant's whistleblower efforts, was not genuine and should be afforded no weight. In particular, the photocopy of the newspaper article:

    a. Had missing page numbers;

    b. The alleged article containing his name and story was in a different type set (i.e. font) as the other articles in the newspaper;

    c. There was no uniform spacing between the end of paragraphs of his article and the bold heading of the next section; and

    d. The name of the company was incorrect in the article.

    e. That the applicant did not address any of these discrepancies and did not offer any explanation for them;

f. That the applicant claimed in his Basis of Claim Form ("BOC") that other mainstream newspapers published the article about his story, although anonymously. When asked why he had not obtained copies of these articles, he said he could not get them from the publishing houses, however he did not provide any further details about when he had contacted the publishers, whether he was able to contact anyone else to obtain these articles, or whether he would face any risk getting this evidence. The RPD did not find it reasonable that the applicant was not able to obtain copies of these articles from these other newspapers, which are more prominent in Kenya;

g. That because the RPD did not believe that the applicant was ever a whistleblower, that the RPD rejects all allegations that Tata Chemicals, County officials, or the Police would pursue him in Kenya;

h. That in any event, there is no evidence that the police are pursuing him in Kenya;

i. That although the applicant claimed to have been attacked on several occasions because of his whistleblowing activities, the RPD concluded that this never happened, because the Applicant was never a whistleblower; and

j. That although the applicant says that someone tried to break into his home on one occasion, and that he was robbed at a bus station on another occasion, the Applicant does not claim to know who committed these crimes, and there is no evidence that they are in any way tied to the applicant's alleged whistleblowing activities.

A. *Procedural issue re clerical error in Notice of Decision*

[5] The RPD's Notice of Decision incorrectly stated the Applicant could appeal its decision to the RAD. However subsection 110(2) of the *IRPA* prohibits appeals where the RPD found no credible basis.

[6] On December 4, 2020, Applicant's Counsel, fully aware of the RPD's Decision, filed an application for leave and judicial review with this Court, challenging the RPD's decision. This application for judicial review incorrectly identified the deciding tribunal as the RAD, but bore the correct RPD file number and correct date and related to the same Decision.

[7] The Applicant stated that on January 20, 2021, his Counsel recommended discontinuing the judicial review because there was a "mismatch" between the RPD's Notice of Decision and the reasons in the Decision in respect of which leave already had been applied for by counsel in this Court. The Applicant sought to obtain a Notice of Decision that "matched" the RPD's reasons.

[8] On January 20, 2021, Applicant's Counsel sent the RPD a letter advising that:

> a. The RPD concluded that there was no credible basis for the claim and that there was therefore no right to appeal to the RAD;
>
> b. The RPD's Notice of Decision was therefore in error; and
>
> c. Requested a corrected Notice of Decision.

[9] As noted, at all material times the Applicant had the reasons of the RPD dated November 12, 2020, the correct RPD file number and correct date, and only sought a revised Notice of Decision.

[10] On January 21, 2021, Applicant's Counsel filed a notice of discontinuance with respect to the previously filed application for judicial review. This it seems was based on his counsel's belief a clerical error resulting in a corrected amended Notice of Decision constituted a different decision, giving rise to a new filing deadline and the right to pursue a fresh application for leave to apply for judicial review.

[11] On February 2, 2021, an Amended Notice of Decision was issued. The amended notice removed reference to the Applicant having a right to appeal to the RAD, and explicitly stated the RPD found that the Applicant's claim does not have a credible basis. The Decision remained the same, and was the subject of both the original and amended Notices of Decision, and was the same Decision of the RPD dated November 12, 2020, in respect of which the Applicant had applied for but discontinued an application for leave.

[12] The RPD mailed the Amended Notice of Decision to the Applicant, and faxed it to the Applicant's former Counsel, who acted on his behalf before the RPD. That said the Applicant and his former counsel attest they never received the document, although it is not disputed they had the underlying decision of the RPD dated November 12, 2020. The Applicant claims to have only received the Amended Notice of Decision on June 29, 2021, when a CBSA officer provided it to him.

[13] It was only on June 30, 2021, that the Applicant filed the present application, which challenges the Decision of November 12, 2020. The Applicant also filed a motion for a stay of his removal from Canada scheduled for July 21, 2021. On July 20, 2021, Justice Southcott dismissed the Applicant's stay motion. The Applicant was removed from Canada to Kenya that day.

[14] In July 2021, prior to leave being granted on the present application, the Applicant filed an affidavit stating he was "currently hiding in Nairobi, Kenya." The Respondent took the position the present application as moot because the Applicant was not outside his country of nationality and, as such, did not fall within the parameters of sections 96 of 97 of *IRPA*. At the time that position was supportable. However, following the close of pleadings, in August 2022, the Court permitted the Applicant to file late evidence. The Applicant now says he is living in Dubai, UAE, outside his country of nationality. The Respondent's mootness argument has been dropped.

III. Decision under review

[15] This Application challenges the Amended Notice of Decision and its underlying reasons issued by the RPD on November 12, 2020. As I have largely reproduced most of the RPD's reasons above, I will not do so again except to say that the RPD's decision was based on a large number of negative credibility findings, insufficient evidence and inconsistencies in the Applicant's evidence resulting in its ultimate conclusion that there was no credible basis for the Applicant's claim.

IV. Issues

[16] The primary issue on this application is reasonableness. Where procedural elements are engaged they will be assessed on the basis of correctness.

V. Standards of Review

[17] Neither party made explicit submissions as to the applicable standard of review. I will outline both reasonableness and correctness in turn.

A. *Reasonableness*

[18] In *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, issued at the same time as the Supreme Court of Canada's decision in *Vavilov*, the majority per Justice Rowe explains what is required for a reasonable decision, and what is required of a court reviewing on the reasonableness standard:

> [31] A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov*, at para. 85). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
>
> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para.

> 90). The reviewing court must ask "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
>
> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100).
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> [Emphasis added]

[19] That said, *Vavilov* makes it abundantly clear the role of this Court is not to reweigh and reassess the evidence unless there are "exceptional circumstances". The Supreme Court of Canada instructs that this Court "must" refrain from such reviews:

> [125] It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker": *CHRC*, at para. 55; see also *Khosa*, at para. 64; *Dr. Q*, at paras. 41-42. Indeed, many of the same reasons that support an appellate court's deferring to a lower court's factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review: see *Housen*, at paras. 15-18; *Dr. Q*, at para. 38; *Dunsmuir*, at para. 53.
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> [Emphasis added]

[20] The Federal Court of Appeal recently reiterated in *Doyle v Canada (Attorney General)*, 2021 FCA 237 [*Doyle*] that no part of the role of this Court is to reweigh and reassess the evidence with exceptions as noted:

> [3] In doing that, the Federal Court was quite right. Under this legislative scheme, the administrative decision-maker, here the Director, alone considers the evidence, decides on issues of admissibility and weight, assesses whether inferences should be drawn, and makes a decision. In conducting reasonableness review of the Director's decision, the reviewing court, here the Federal Court, can interfere only where the Director has committed fundamental errors in fact-finding that undermine the acceptability of the decision. Reweighing and second-guessing the evidence is no part of its role. Sticking to its role, the Federal Court did not find any fundamental errors.
>
> [4] On appeal, in essence, the appellant invites us in his written and oral submissions to reweigh and second-guess the evidence. We decline the invitation.

[21] Furthermore, in this Court's decision of *Martinez Giron v Canada (Citizenship and Immigration)*, 2013 FC 7, Justice Kane described the significant deference owed to tribunal decision makers:

> [14] With respect to the Board's analysis of credibility and plausibility, given its role as trier of fact, the Board's findings warrant significant deference: *Lin v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1052, [2008] FCJ No 1329 at para 13; *Fatih v Canada (Minister of Citizenship and Immigration)*, 2012 FC 857, [2012] FCJ No 924 at para 65.
>
> [15] This does not mean, however, that the Board's decisions are immune from review where intervention is warranted. In *Njeri v Canada (Minister of Citizenship and Immigration)*, 2009 FC 291, [2009] FCJ No 350 Justice Phelan stated:
>
> > [11] On credibility findings, I have noted the reluctance that this Court has, and should have, to overturn such findings except in the clearest case of error (*Revolorio v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1404). The deference

> owed acknowledges both the contextual circumstances and legislative intent, as well as the unique position that a trier of fact has to assess testimonial evidence. That deference is influenced by the basis upon which credibility is found. The standard is reasonableness subject to a significant measure of deference to the Immigration and Refugee Board.
>
> [12] However, deference is not a blank cheque. There must be reasoned reasons leading to a justifiable finding. With considerable reluctance, I have concluded that this decision does not meet this standard of review.

B. *Correctness*

[22] Questions of procedural fairness are reviewed on the correctness standard: *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, per Binnie J at para 43. That said, I note in *Bergeron v Canada (Attorney General)*, 2015 FCA 160, per Stratas JA at para 69, the Federal Court of Appeal says a correctness review may need to take place in "a manner 'respectful of the [decision-maker's] choices' with 'a degree of deference': Re: *Sound v Fitness Industry Council of Canada*, 2014 FCA 48, 455 N.R. 87 at paragraph 42." But see *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [per Rennie JA]. In this connection I also note the Federal Court of Appeal's recent decision holding judicial review of procedural fairness issues is conducted on the correctness standard: see *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship*), 2020 FCA 196 per de Montigny JA [Near and LeBlanc JJA concurring]:

> [35] Neither *Vavilov* nor, for that matter, *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, have addressed the standard for determining whether the decision-maker complied with the duty of procedural fairness. In those circumstances, I prefer to rely on the long line of jurisprudence, both from the

> Supreme Court and from this Court, according to which the standard of review with respect to procedural fairness remains correctness.

[23] I also understand from the Supreme Court of Canada's teaching in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 23 that the standard of review for procedural fairness is correctness:

> [23] Where a court reviews the merits of an administrative decision (i.e., judicial review of an administrative decisions other than a review related to a breach of natural justice and/or the duty of procedural fairness), the standard of review it applies must reflect the legislature's intent with respect to the role of the reviewing court, except where giving effect to that intent is precluded by the rule of law. The starting point for the analysis is a presumption that the legislature intended the standard of review to be reasonableness.
>
> [Emphasis added]

[24] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 50, the Supreme Court of Canada explains what is required of a court reviewing on the correctness standard of review:

> [50] When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

VI. Analysis

A. *Assessment of evidence*

(1) No credible basis assessment

[25] The Applicant notes that, as per the Federal Court of Appeal's decision in *Rahaman v Canada (Minister of Citizenship and Immigration),* 2002 FCA 89, at paragraph 51 [*Rahaman*], the "no credible basis" test "requires the Board to examine all the evidence and to conclude that the claim has no credible basis only when there is no trustworthy or credible evidence that could support a recognition of the claim."

[26] The Applicant submits the RPD did not examine all of the submitted evidence. Specifically the Applicant refers to an affidavit, dated August 22, 2019, from one George Owino Oguma, who provided sparse bare bones information, possibly sourced from the Applicant it is not clear, essentially repeating the very basics of the Applicant's allegation he is a whistleblower.

[27] The Applicant explains that because no *reference* is made to this affidavit in the reasons of the RPD, the no credible basis test was not met.

[28] With respect, I disagree. I appreciate the Applicant relies on the Federal Court of Appeal in the case of *Rahaman*, however and with respect I find *Rahaman* inapplicable on the facts of this case. That decision says the no credible basis test "requires the Board to examine all the evidence and to conclude that the claim has no credible basis only when there is no trustworthy or credible evidence that could support a recognition of the claim."

[29] I do not take *Rahaman* to require the RPD to specifically and separately identify every document considered and assessed by it, any more that it requires the RPD to consider and separately identify and assess every portion of testimonial evidence.

[30] Nor do I accept *Rahaman* qualifies the well known and frequently applied doctrine that triers of fact are not required to identify and assess every piece of evidence, or to make an explicit finding on each constituent element thereof as the Applicant submits. This indeed is the rule succinctly established in *Vavilov* at para 128:

> [128] Reviewing courts cannot expect administrative decision makers to "respond to every argument or line of possible analysis" (*Newfoundland Nurses*, at para. 25), or to "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (para 16). To impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice.
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> [Emphasis added]

[31] It is also trite law that the RPD is presumed to have taken into consideration all the evidence, whether or not it specifically indicates having done so in the reasons, unless the contrary is shown.

[32] In any event I am far from persuaded the RPD failed in its duty to consider the said affidavit. I agree with the Respondent who submitted:

> 32. Although the Oguma Affidavit is not mentioned in the reasons, there is no reason to believe that the RPD failed to consider and examine it prior to making its decision. During the RPD hearing, the applicant answered questions about George Oguma and what the Oguma Affidavit was meant to confirm. In particular, the applicant testified that Mr. Oguma is someone who has known him since 2008 and who knew him as a whistleblower since 2008. The RPD is not required to mention and give weight to the applicant's vague testimony about a person of unidentified title and relationship to the applicant, and unconfirmed knowledge of the facts at issue. The Oguma Affidavit sheds no further light on any of these details, and the onus rests with the applicant to bring his best foot forward with evidence.

[Footnotes omitted]

[33] With respect, I conclude the Applicant has failed to establish his submissions in this respect.

(2) Assessment of credibility re newspaper article submitted by and oral testimony of the Applicant and otherwise

[34] The Applicant also submits the RPD erred in its assessment and weighing of certain evidence regarding the Applicant's central allegation that he was a whistleblower who disclosed inside information of corruption. To support his allegations to this effect, the Applicant filed a newspaper article purportedly reporting on his discovery and disclosure.

[35] The RPD considered this submission and found it untruthful:

> a. The applicant claimed to be working at the Kajiado county office's finance department in Kenya. The applicant repeatedly confirmed that his office never pursued legal action against Tata Chemicals because the directors of Tata Chemicals had bribed Kajiado country officials. He also confirmed that he would have known about any such legal action, given his role working for the county; Indeed he told the RPD during the hearing that "To be certain it was [not] pursued through the court"
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> b. The RPD put a newspaper article to the applicant, which the RPD obtained from the internet, indicating that a Kajiado Court had quashed a tax bill and ordered renegotiations between Tata Chemicals and Kajiado County. The applicant replied that the newspaper article was probably not genuine. When the RPD pointed out that the article was from the same newspaper from which the applicant had himself submitted another newspaper article, the applicant "…did not say anything to this observation by the panel and remained silent."

c. The RPD then again asked the applicant if there was a Court case involving Tata Chemicals and Kajiado County. The Applicant again said that there was no court case;

d. The RPD then put to the applicant a judgment from a court case involving Tata Chemicals and Kajiado County, which was available on the internet, and quoted to the applicant the case law citation. Following this, the applicant "…admitted that there was a court case between the parties involved." When the RPD asked the applicant why he withheld this information, the applicant "…did not answer the question and was silent."

e. When asked if he disputed the information in the court transcript, the applicant said that he accepts that the court transcript is genuine, and he "…confirmed that there was a court case between Tata Chemicals and Kajiado County and that he knew about it."

f. That a purported photocopy of a newspaper article from the "County Press" dated October 2019, outlining the applicant's whistleblower efforts, was not genuine and should be afforded no weight. In particular, the photocopy of the newspaper article:

a. Had missing page numbers;

b. The alleged article containing his name and story was in a different type set (i.e. font) as the other articles in the newspaper;

c. There was no uniform spacing between the end of paragraphs of his article and the bold heading of the next section; and

d. The name of the company was incorrect in the article;

e. That the applicant did not address any of these discrepancies and did not offer any explanation for them;

f. That the applicant claimed in his Basis of Claim Form ("BOC") that other mainstream newspapers published the article about his story, although anonymously. When asked why he had not obtained copies of these articles, he said he could not get them from the publishing houses, however he did not provide any further details about when he had contacted the publishers, whether he was able

> to contact anyone else to obtain these articles, or whether he would face any risk getting this evidence. The RPD did not find it reasonable that the applicant was not able to obtain copies of these articles from these other newspapers, which are more prominent in Kenya;
>
> g. That because the RPD did not believe that the applicant was ever a whistleblower, that the RPD rejects all allegations that Tata Chemicals, County officials, or the Police would pursue him in Kenya.
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> […]

[36] The Applicant has not persuaded me these findings are unreasonable. The rule in this respect is that absent exceptional circumstances, which in my view are not present, this Court must refrain from reweighing and reassessing evidence considered by the RPD. That is no part of judicial review, as the Federal Court of Appeal put it in *Doyle*. And as our highest Court states in *Vavilov* at para 125:

> [125] It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker": *CHRC*, at para. 55; see also *Khosa*, at para. 64; *Dr. Q*, at paras. 41-42.
>
> [Emphasis added]

[37] Here, the RPD conducted a detailed and reasonable review of the conflicting claims, and assessed and weighed the evidence as it did. It had the benefit of seeing and hearing the Applicant, and reviewing the original documents, neither of which I enjoy. In both assessing the testimony and documentary evidence the RPD is entitled to considerable deference as already

noted, and with respect I defer in these respects to the RPD. There is no unreasonableness in these respects.

[38] I make the same determinations with respect to the balance of the key findings of the RPD, and will not engage in reassessing or reweighing the evidence relating to its findings as follows:

> […]
>
> h.. That in any event, there is no evidence that the police are pursuing him in Kenya;
>
> i. That although the applicant claimed to have been attacked on several occasions because of his whistleblowing activities, the RPD concluded that this never happened, because the Applicant was never a whistleblower; and
>
> j. That although the applicant says that someone tried to break into his home on one occasion, and that he was robbed at a bus station on another occasion, the Applicant does not claim to know who committed these crimes, and there is no evidence that they are in any way tied to the applicant's alleged whistleblowing activities.
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> [Footnotes deleted]

B. *External research and miscommunication: procedural unfairness*

[39] The Applicant takes issue with the RPD's use of external research. The RPD member adjourned the hearing in order to conduct research and came back with a newspaper article relating to disputes between the Magadi Soda Company and the county government, where the Applicant was employed. Upon resuming the hearing, the Applicant claims the member engaged in a problematic line of questioning, that is, asking about the *tax dispute* while the Applicant answered in reference to corruptive practice regarding *lease extensions*. The member's purpose

was seemingly to determine whether the Applicant had knowledge of a legal dispute between the company and county government. In the Applicant's view, given his misunderstanding as to the subject matter of the question, it would have been "difficult to impossible" for the Applicant to address this confusion.

[40] The Applicant further claims this alleged confusion could have been avoided had the RPD allowed advanced notice of the newspaper article being referred to by the member, as per section 33(1) of the *Refugee Protection Division Rules*, SOR/2012-256 [*RPD Rules*]. Neither, as the Applicant points out, was this disclosure provided 10 days prior to a hearing, as per section 34(3) of the *Rules*. The Applicant states that reasons must be provided as to why the RPD need not bind itself by this disclosure requirement.

[41] The Applicant submits that the disclosure of this information and documentation in the middle of a hearing was a breach of the duty of fairness.

[42] With respect, I disagree. I am not persuaded the RPD erred by locating two publicly available documents on the internet during a break, questioning the Applicant about those documents, and relying on those documents in rendering its decision. This with respect was done with the explicit knowledge and the specific approval of counsel for the Applicant at the hearing in the presence of the Applicant.

[43] With respect, it also seems to me the distinction the Applicant asks this Court to draw between disputes concerning leases and disputes concerning taxes is one of recent invention. I

say this because this issue was not raised at the hearing, but instead is raised for the first time here. With respect, and notwithstanding the Applicants submission otherwise, I conclude that at no time did the Applicant put this distinction to the RPD at or after the hearing although he was represented by counsel and could have done both. I have no doubt this alleged distinction could and should have been raised at the hearing.

[44] I also note that in any event a failure to advance a timely objection – even to an unfair process, which this was not - constitutes implied waiver: *Somani v Canada (Minister of Citizenship & Immigration)*, 2006 FC 734, para 7:

> [7] Finally, I agree with Justice Mosley that the failure of a party to advance a timely objection to an unfair process, including a fettering of discretion, constitutes an implied waiver. Having failed to object to the application of Guideline 7 when this case was presented to the Board, it is not now open to the Applicant to raise the issue for the first time in this forum: see *Benitez*, above, at paragraphs 221 and 237.

[45] In this connection the RPD explicitly asked Applicant's counsel at the hearing whether he objected to taking a break so that the RPD member could search the internet for "…anything pursued by Kajiado county officials through the court system". Counsel responded "Of course sir. No objection at all sir."

[46] It is hard to imagine a more explicit waiver of what the RPD did than this.

[47] I am also satisfied the RPD complies with *RPD Rules* and duty of fairness. As the Respondent notes, Rule 33(1) of the *RPD Rules* say that if the RPD "wants to use a document in a hearing, the Division must provide a copy of the document to each party." The jurisprudence

confirms that there are no time constraints on Rule 33(1), and that the RPD may disclose documents to a claimant at the hearing: *Kandiah v Canada (Minister of Citizenship & Immigration)*, 2021 FC 1388.

[48] In this case, it is not disputed the RPD gave the Applicant and his counsel a copy of one of the two documents in question namely the newspaper article from County Press. There is no procedural unfairness here.

[49] With respect to the Kenyan court judgment, the other document found by the RPD in its brief and consented to internet search, the RPD did not print a copy and physically give it to the Applicant's counsel. The RPD told as much to the Applicant and his counsel. Notably, again, there was no objection of any kind by counsel or the Applicant. Moreover, the RPD gave the Applicant all the information necessary to access the judgment: the website Kenyalaw.org, petition no. 2 of 2019, the title of the judgment, the date (May 3, 2019), and the judge (Nykaundi).

[50] Counsel at the hearing did not ask for a physical copy of judgment. Counsel did not claim to lack access to the Kenyan judgment through electronic means, nor did he claim to require time to review the Kenyan judgment prior to making final submissions.

[51] Counsel for the Applicant choose not to conduct any redirect examination of the Applicant on this point. No caveats or reservations were advanced at the hearing or in any post-submission filing.

[52] I accept as the Applicant himself submits that neither he or his counsel even looked at the Kenyan judgment until it was referenced in the RPD's reasons.

[53] I am asked to but, and with respect, I am not able to fault the RPD for the Applicant's failure to protect his interests in this respect given he was represented by counsel and had every opportunity to do so at the time when any concerns –legitimate or otherwise - could and should have been raised.

[54] I agree the RPD erroneously referred to the Kenyan judgment as a "transcript" at the hearing, and in its reasons the RPD refers to it as a judgment. That said, the RPD also explicitly referred to it as "a very lengthy judgment" at the hearing. Nothing turns on this semantic situation which is distinction without a difference.

C. *Abuse of process*

[55] I have decided to deal with the application on the merits, and that it will be dismissed. Therefore it is not necessary to consider the Respondent's abuse of process submissions concerning filing an application for leave from a decision, discontinuing it, and then many months later filing a second application for leave to apply for judicial review of the same decision. That said, I am somewhat mystified by the Applicant's decision to abandon his original application particularly given both the original and amended Notices of Decision relate to the same Decision. I would not recommend the approach taken here if this clerical error situation arise again, although of course it will be for the Court then to assess the matter if counsel considers it worthwhile.

D. *Mootness*

[56] The Respondent withdrew his mootness argument before the hearing in his memorandum. Therefore I need not deal with this issue either.

E. *Payment for the Applicant's return to Canada by Canada if judicial review is granted*

[57] It is not necessary to deal with this issue because judicial review will be dismissed.

F. *Style of Cause*

[58] The Respondent notes that in the Applicant's further memorandum of argument, the style of cause was unilaterally changed to add a second respondent, namely the Minister of Public Safety and Emergency Preparedness. The Respondent notes that the Applicant has not provided reasons for doing so nor has he obtained leave of the Court, which is required to amend a style of cause.

[59] The Respondent submits and I agree the Court should keep the Minister for Citizenship and Immigration as the only Respondent in the style of cause.

VII. Conclusion

[60] In my respectful view, the Applicant has failed to establish that the RPD's decision is either unreasonable or incorrect. Therefore, this Application for judicial review will be dismissed.

VIII. Certified Question

[61] The Applicant proposed two questions for certification, one dealing with the abuse of process issue that is not dealt with, and the other with the payment issue that is not dealt with. No question was proposed by the Respondent. I see no such question. Therefore no question of general importance will be certified.

JUDGMENT in IMM-4411-21

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed, no question of general importance is certified, and there is no Order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4411-21
STYLE OF CAUSE:	DICKENS OCHIENG OPEE v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY WAY OF VIDEOCONFERENCE
DATE OF HEARING:	NOVEMBER 23, 2022
JUDGMENT AND REASONS:	BROWN J.
DATED:	NOVEMBER 28, 2022

APPEARANCES:

Kobra Rahimi David Matas	FOR THE APPLICANT
Alexander M. Menticoglou	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Rahimi Law Barristers and Solicitors Winnipeg, Manitoba	FOR THE APPLICANT
Attorney General of Canada Winnipeg, Manitoba	FOR THE RESPONDENT